(2)

No. 04-1233

In The Supreme Court of the United States

DALLAS E. BUTLER, JEANNIE C. DE LAMOS, ALAN J. DE SA, TOM GAMBLE, WOODROW M. HASSINGER, RUDY MACK, SR., JOE R. MCCABE, PHILIP B. NASH, MICHAEL L. OKSNER, WILLIAM SIEGEL, PAUL TURNER III, AND ARTHUR B. WARD,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF AGE60RULE.COM (SAMUEL D. WOOLSEY, J.D.) AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TO THE COURT AND ALL PARTIES:

Through counsel, Movant, Age60Rule.com (Samuel D. Woolsey, J.D.), requests leave to file an *amicus curiae* brief in support of the grant of *certiorari*, in the above-captioned case. Movant Woolsey is the sole author of this brief. Following careful review, but without editorial or other input, Anthony P.X. Bothwell (Bothwell) counsel of record for Age60Rule.com, submits on behalf of Movant. Bothwell also is counsel of record for Dallas E. Butler, *et al.*, the Petitioners (with the consent of both Movant and Petitioners, there being no conflict of interest).

Movant Woolsey began investigating and reporting on the regulatory, legal, medical, and factual history of the FAA's age 60 rule in the early 1990s. For years, Woolsey has been approached by interested parties from throughout the legal, medical, media, and aviation communities, including some from the FAA, seeking information and expert advice on issues related to, and the FAA's decades-long defense of, the rule. In 2001, Woolsey created Age60Rule.com as a non-profit educational and research resource, together with the related internet website, www.age60rule.com, to more easily disseminate his substantial volume of data and archived materials to an increasingly interested and growing public.

The *amicus curiae* brief submitted here offers a cogent and original analysis pertaining to *the threshold issues* this Court will face before deciding on the grant of *certiorari* as requested.

Respondent Federal Aviation Administration, through the Solicitor General, has withheld permission to file this brief. Although the Court generally disfavors motions to file *amicus* briefs where any party has withheld consent, undersigned counsel believes that the attached brief will be

uniquely helpful to the Court in evaluating the request pending in this case.

April 6, 2005

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INTEREST OF AMICUS CURIAE[1]

Age60Rule.com (Samuel D. Woolsey, JD) is an independent non-profit educational research resource for issues related to the Federal Aviation Administration's age 60 rule. All Age60Rule.com materials are available to the public through the internet website: www.age60rule.com.

STATEMENT OF THE ISSUES

Two threshold issues confront this Court before Petitioners' requests for exemptions can be properly considered. These issues are: (1) The roll of judicial oversight in the modern American administrative State; and (2) the consequences of judicial abdication of its proper roll in that oversight.

SUMMARY OF THE ARGUMENT

In this Court's consideration of this petition for a writ or certiorari, it must first define the essential elements of the FAA's decades-long defense of its age 60 rule. This is necessary not only because of the narrowness of the rule—it applies only to pilots and carriers operating large aircraft in common carriage—but because, as explained below, no such discipline has been adopted previously by any American court. The result has been a judiciary blinded first by prejudice, then by precedent; an agency utterly contemptuous of the judiciary to which it is—or should be—by statute, subject; and a near half-century of tension clogging both agency and judicial calendars.

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[1] This brief was authored and is funded by Samuel D. Woolsey, JD., with neither input nor asssistance from counsel for either party. Anthony P.X. Bothwell, Esq., counsel of record for Age60Rule.com, submits on behalf of Age60Rule.com.

A

JUDICIAL OVERSIGHT IN THE MODERN AMERICAN ADMINISTRATIVE STATE

Virtually every treatise on this subject opens urging a presumption of regularity and judicial deference to agency expertise. None, however, discuss the consequence should this oversight descend into blind affirmation and unbridled deference. The result of either, most certainly of the two, together, is a loss of the authority, independence, and respect wrought for itself two centuries ago by John Marshall in his seminal Marbury v Madison.

The issues of presumption and deference are significant here because when created in 1958,[2] the FAA's actions were intentionally made subject to judicial review.[3] Further, during floor debate, Rep. Meader (Mich.) complained: "This bill vests dictatorial power in one man. In this bill, we are creating an aviation czar."[4] A criticism the incoming Administrator, Elwood Quesada, had already accepted:

> The Administrative Procedures Act, under which these [FAA] regulations will be issued, and a provision for appeals to the courts, provides the necessary safeguards against arbitrary action on the part of the issuing authority ... [5]

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2 Federal Aviation Act of 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), *reprinted in* U.S. Code & Cong. & Admin. News, 3741 *et seq.* (P.L. 85-726). Hereafter FAAct.

3 FAAct Sec. 1006(a). (72 Stat. 795).

4 Cong. Rec. Aug. 4, 1958 *at* 16087.

5 Letter, E.R. Quesada to Rep. Orrin Harris, Chairman [House] Committee on Interstate and Foreign Commerce dtd. July 24, 1958, *reprinted in* U.S. Code & Cong. & Admin. News at 3761

Despite these legislative concerns, statutory protections, and agency acceptance, no clearer examples of blind affirmation and unbridled deference exist than in the judiciary's response to the first challenges to the age 60 rule, suits to first delay then prohibit its enforcement.[6] There, both the district and appellate courts abandoned their duties as jurists to become advocates for the rule, for the agency, and for its Administrator.

1. ALPA v Quesada: Deference to Advocacy:

If nowhere else in the administrative State, the plaintiffs in ALPA v Quesada had a right to expect—and the judiciary a duty to deliver—a fair hearing on the evidence, free of animosity toward themselves, or favor for the agency or the person of the Administrator. Although pursuing a legal right established in three prior binding arbitrations,[7] the pilot plaintiffs were denied both.

In rejecting their plea for a preliminary injunction, the district court's Judge Bicks opened with a scathing condemnation of the plaintiff pilots and their motives:

> Any attempt to weigh the countervailing considerations of dollar loss to the approximately 40 pilots against the public [footnote omitted] safety in air carrier operations borders on vulgarity, ... [8]

followed by an exaltation of Administrator Quesada worthy of Rep. Meader's Czar:

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[6] ALPA v Quesada, 182 F. Supp. 595 (S.D., N.Y., 1960); 276 F.2d 892 (2d Cir. 1960); 286 F.2d 319 (2d Cir. 1961).

[7] *See* Notes 22, 23, below, and Petition notes 21-26, Exhibits B, C, and associated texts.

[8] ALPA v Quesada, 182 F. Supp. 596.

> ... as against the determination made by Lt. Gen. Quesada, Commanding General of the 9th Tactical Air Command from the time of invasion of Normandy until the termination of air hostilities in Europe, with an accumulated experience of 12,000 (twelve thousand) hours as a pilot, now serving as Administrator of the Federal Aviation Agency, ... [9]

Nor was Judge Bicks' endorsement of Administrator Quesada's supporting evidence any less deferential:

> ... the report from the President of the Aerospace Medical Association: 'Our Association supports the Federal Aviation Agency in making this regulation in the interest of public safety * * * Insight into the validity of this regulation in the realm of public safety is very well summarized in the editorial from the Washington Post of December 8, 1959, entitled, 'Pilot Age and Safety' [footnote omitted] '; (3) the statement of Harry F. Guggenheim, aviation authority and chairman of the governing body of the Cornell-Guggenheim Aviation Safety Center, released May 19, 1959, ... [10]

The statement is misleading, incomplete, and in reverse order. The extended remarks were actually those of Quesada at a Daniel and Florence Guggenheim Foundation board meeting on May 18, but released the next day with attribution to Guggenheim.[11] The December 8th newspaper piece was a by-line, not an editorial, appeared three days *after* the rule's publication, and was based largely on the Foundation press release. The statement attributed to the Aerospace Medical Association also appeared *after* the rule's

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9 *Ibid.*

10 *Ibid.*

11 Minutes, Foundation and Executive Committee Meeting, Daniel and Florence Guggenheim Aviation Safety Center, May 18, 1959.

publication (January 1960) as the personal and editorial comment of its president. This was not an endorsement by the Association as it was based on, and quoted extensively from, the newspaper article.[12]

The only portion of Judge Bicks' opinion that might *appear* to support a safety rationale for the rule was a comment from the Handbook of Aging and the Individual, authored by Ross McFarland, edited by James Birren (1959):

> ... The process of aging is of greater significance for airmen than for most occupational groups because of the exacting demands on their individual abilities. * * * Slowing reaction times for complex performance may reduce a pilot's ability to take the necessary actions required by modern, high speed jet aircraft. These changes may vary greatly from one person to another in both nature and extent, but even minor deterioration in many of the psychological and physiological functions may interact to produce *a significant loss in general efficiency.* [13] (Italics added, *see* note 16 and text, below.)

Here, too, Judge Bicks' recitation is incomplete, out of context, and misstates McFarland's message. In lines omitted from Bicks' opinion, McFarland balances the older pilots' "slowing reaction times" with "improved safety records" due to their greater knowledge, experience, and judgment:

> ... [I]t may be expected that the judgment and experience of the older pilots may also contribute to the improved safety records and be of special value in the

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12 *See* Petition notes 60, 61, Exhibit T and associated texts.

13 McFarland, R, *et.al., Work and Occupational Skills* in Handbook of Aging and the Individual, Psychological and Biological Aspects (Birren, J., Ed.) University of Chicago Press (1959), 452-497, 471.

> handling of large and expensive equipment. Although the younger pilot may be as competent in the actual flying of a plane, repeated flights under many adverse circumstances give the older man a wider range of knowledge upon which to base his decision. ...[14]

Throughout his essay, McFarland repeatedly promotes the value of experience over age. Three examples:

> ... the ratio of fatal accidents to all accidents is highest in the youngest age groups ...

> ... that there is no definite increase in the number of accidents with age suggests that factors other than age may be important determinants ...

> Undoubtedly, the most important advantage which the older pilot has is the experience he has gained in flying various types of equipment under all conditions. ... The individual who has not learned by experience to exercise a high order of judgment sooner or later gets into difficulties and is eliminated from the active flying group.[15]

Further, McFarland's concern was not safety, but efficiency, note the italicized phrase above, "*a significant loss in general efficiency.*" McFarland expanded on this point, again, with words omitted from Judge Bicks' opinion:

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14 *Ibid.*

15 *Id.*, all three at 476.

> It should be kept in mind ... that the present vitality and rapid growth of the aviation industry are intimately related to the youthfulness of the personnel and might be best maintained by an early retirement age. [16]

As for McFarland's several suggestions that air carrier pilots should retire "at about" 60, (one example):

> Although it is not yet possible to establish a retirement age for civil airline pilots based on scientifically determined facts, enough is known about the aging process to suggest that these pilots should retire at about the age of 60. ...[17]

the record shows that both McFarland and Birren had attended, by invitation, a confidential presentation by Quesada to enlist scientific support before initiating his rule.[18] Held three weeks before publication of the NPRM, the attendees were presented with transition training times for older pilots, union seniority issues, and costs[19]—nothing alluding to safety—and asked to keep the meeting "confidential."[20] That this secret meeting became the basis for McFarland's "age 60" suggestions is demonstrated by the specific age he mentions—60—and a reference to the proposed rule in his text:

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16 *Id.*, at 471

17 *Ibid.*

18 *See* Petition, notes 35-38 and associated text, together with Exhibits J, K, and L.

19 These data were later declared inadequate to support the mandatory retirement rule by FAA in-house counsel. *See* Petition, footnote 43, Exhibit Q and associated text.

20 *See* Petition, Exhibit K and text.

> The United States Federal Aviation Agency is proposing to rule that the retirement age shall be fixed at 60 and that no civil airline pilot shall be allowed to qualify to fly jet passenger aircraft after the age of 55.[21]

The remainder of Bicks' opinion dismisses the three arbitrations that had established the pilots' right to continue flight past age 60 on the basis that the government had not been represented, together with a gross misrepresentation of Western Airlines' "safety" defense. Judge Bicks:

> We are not informed of the proof before this arbitrator, but in appraising the weight to be given to it in this proceeding, it should be observed that "*at some age--say 90--*" he "*would take judicial notice of impairment beyond all reason.*" Furthermore, and importantly—it does not appear that the public interest—in the person of a representative of the appropriate governmental agency—was represented.[22] (Italics added, see below.)

Here, too, Bicks' statement is incomplete, out of context, and misleading. The more complete passage reads:

> ... (4) Federal authorities have chosen to attribute nearly all airplane accidents to weather conditions, mechanical failure, or other causes not related to pilots' physical deficiencies; (5) temporary physical impairment can occur in any given individual at almost any age, and this is the apparent reason that commercial airplanes carry co-pilots, regardless of the youth of the pilot; (6) the Carrier here has shown no relationship between age of pilot from its own experience or from any other carrier's

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21 Handbook of Aging and the Individual, at 471.

22 ALPA v Quesada, at 598.

> experience; and finally (7) the normal way to determine physical ability or inability is through reasonable and universally accepted medical examinations, which are available to the carrier here.
>
> Thus, there is no testimonial basis and no "fact of life" on which we could be expected to take a kind of "judicial notice" that supports the view that it is unsafe to let a pilot perform after the age of 60. *This is not to say that there is not some age – say 90 – when we would take judicial notice of physical impairment beyond all reason.* It is enough to say that the evidence here does not support the theory that attainment of age 60 is in itself enough to disqualify a pilot.[23] (Bicks' reference in italics.)

Through his personal biases, citation to irrelevant, post-hoc testimony, incomplete, out of context, and misleading citations to relevant evidence, and failure to identify any credible evidence to support either the rule or his decision, Judge Bicks abandoned his role as judge to become an advocate, unable to see beyond the person of his idol, "Lt. Gen. Quesada, Commanding General of the 9th Tactical Air Command from the time of invasion of Normandy until the termination of air hostilities in Europe, ..."

2. ALPA v Quesada: The 2nd Circuit as Accomplice:

ALPA appealed Judge Bicks' denial of the temporary injunction, and lost.[24] In its first affirmation of the district

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[23] Extract appears in: Ruppenthal, K.M., *Compulsory Retirement of Air Line Pilots*, 14 Indus. & Lab. Rel. Rev., 528, 534-35 (1961). The original arbitration is not available. But the portion appearing here was reported by an authority in the field, published contemporaneously in a peer-reviewed journal, of appropriate subject matter, more than 20 years ago. (Ref: FRCP 901(b)(8)). *See also* Petition, notes 21-25 and associated texts.

[24] ALPA v Quesada 276 F.2d 892 (2d Cir. 1960)

court's decision, the 2nd. Circuit's panel continued Judge Bicks' practice of misstating the evidence.

> Pursuant to [his] statutory authority the Administrator and his medical staff in the fall of 1958 began a study concerning the aging process and the diseases and physiological deterioration that accompany it in an effort to determine whether a maximum age should be set for service by commercial pilots.[25]

The statement is incomplete, incorrect, and misleading. The FAA did not initiate its study of a maximum age limit for commercial airline pilots until February, 1959.[26]

The *1958* study was not on age-60, but on medical certification standards, initiated in response to two reports on that subject by the independent Flight Safety Foundation (FSF).[27] This 1958 study led to another 1959 rulemaking on medical certifications, overlapping that for the age 60 rule by four months.[28] Except for one suggestion appearing in the first FSF Report concerning air traffic controllers only,[29] neither study addressed age or age limits for any class of

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[25] *Id.*, at 895.

[26] *See* Petition, notes 3-27, Exhibits A-D, and associated text.

[27] Flight Safety Foundation, Inc., FCF/CAA Medical Study (Report No.1), Physical Qualifications of Air Traffic Control Personnel, New York, 21 Feb. 1958, at 86-7; Flight Safety Foundation, Inc., FCF/CAA Medical Study (Report No.2), Medical Aspects of Civil Aviation, New York, 31 Mar. 1958, at 69, 71. *See* Petition, notes 7, 16, 17 and associated text.

[28] 24 Fed. Reg. 2257 (Mar. 21, 1959) NPRM, Physical Standards for Airmen, Medical Certificates; 24 Fed. Reg. 7309 (Sep. 11, 1959) Final Rule, Physical Standards for Airmen; Medical Certificates, Amendment to Medical Standards.

[29] Report No.1, at 86-7. *See also* Petition, notes 7, 16, 17 and associated text.

airmen. The second FSF report examined pilots, supported medical waivers for them, made no mention of an age limit, and found no reason to change their medical criteria for the newly introduced jet transport aircraft.[30]

While one might be misled by the similar issues raised in the two rulemakings, even a cursory review would have revealed their differences—in both finding and purpose. On its face, the 2nd Circuit's decision suggests that it may have been unaware of the separate rulemaking on medical standards, and considered only the FAA's briefs and Judge Bicks' advocacy for its age 60 ruling.

3. The 2nd Circuit's Second Failure in Oversight:

With a subsequent request for a permanent injunction also denied by Judge Bicks, ALPA again appealed to the 2nd Circuit, and were again rebuffed.[31] In this second rejection, the Circuit incidentally upheld Judge Bicks' refusal to order a deposition of Quesada, losing any chance to discover and assess the full scope of the evidence advanced by the FAA in support its rule.[32]

Moreover, by these four decisions, the age 60 rule was affirmed as a valid exercise of the Administrator's regulatory authority, becoming the "precedents" on which all later courts relied in their refusals to reexamine the issue:

> ... As things are now, *if the Age 60 Rule is reasonable, as it has been held to be*, it is not abuse of discretion to reject any individual application for exemption even if the applicant demonstrates that he personally is a superman

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30 Report No.2, at 69, 71. *See also* Petition, notes 7, 16, 17 and associated texts.

31 286 F.2d 319 (2d Cir. 1961)

32 *Id.*, at 320. *See also* note 34 and associated text, below.

immune from the impairments that age normally inflicts.[33] (Italics added.)

This unremitting reliance on the Bicks/2nd Circuit's decisions is unfortunate, as the FAA lost the entire age-60 docket in 1974,[34] while preparing for its first substantive defense of the rule.[35] Thus, neither challengers, defenders, nor courts have since had access to the materials that would support or refute a valid, original basis for the rule.

B

THE LEGACY OF UNBRIDLED DEFERENCE:

The legacy of unbridled deference is utter contempt and unending litigation.

1. Unbridled Deference:

In assessing the legacy of unrestrained deference within the age 60 context, it must be understood that the FAA did not in 1959, and has never since, argued that advancing age, *per se*, compromises safety in air carrier operations. The FAA's argument has always been that the incidence of critical medical defects increases with age, and it is these medical defects, primarily incapacitations due to heart attacks, that in turn, *potentially* increases the risk of accident—but never argued in the narrow, Part 121 air carrier context.

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[33] Starr v FAA, 589 F.2d 307, 312-313 (7th Cir. 1978).

[34] Memorandum, Louise Coomes, AGC-24 to Associate General Counsel, Regulations and Codification Division, subject: Missing Regulatory Dockets 40, 41, and 42 dated July 11, 1973.

[35] O'Donnell v Shaffer, 491 F.2d 59 (D.C. Cir. 1974).

In that context, Congressionally mandated[36] findings of two federal scientific agencies (the Institute of Medicine (IOM), and National Institute on Aging (NIA)), should be significant, if not compelling. In the first, following an exhaustive review of the literature, the IOM found (1981):

> . . . For significant acute events (such as cardiovascular events and stroke), age 60 does not mark the beginning of a special risk or a special increase in risk, although, on average, risk increases with age. Subtle changes that may adversely affect pilot performance also increase with age. ... However, age 60 is not an age of special significance for these subtle changes either.[37]

Addressing risk in air carrier operations, specifically, the IOM found:

> Acute incapacitation of the pilot is not significant as a cause of airline accidents. No [air carrier] accidents were attributed to incapacitation during the period 1968-1977. Because the cockpit crew includes a co-pilot and a flight engineer who can take over the controls, most incapacitations, when they occur, do not cause accidents. ...[38]

These observations were not novel in 1981. They merely repeated many of the FAA's own admissions over the

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[36] Pub.L. 96.171, Dec. 29, 1979. Through five specific questions, Congress ordered the Secretary of Transportation to determine whether the age 60 rule was warranted.

[37] Airline Pilot Age, Health and Performance: Scientific and Medical Considerations, Report of a Study by the Committee to Study Scientific Evidence Relevant to Mandatory Age Retirement for Airline Pilots, Institute of Medicine, National Academy of Science, Washington, D.C., March 1981, at 4.

[38] *Ibid.*

preceding decades. Examples: In 1966, FAA declared that air carrier pilots were "a highly select group . . . more free of serious pathology than a sample of the general population of similar age."[39] Starting in 1973 and continuing through at least 1990, the FAA declared, in at least nine annual/bi-annual reports, that airline pilots are "essentially purged of disease prevalence that contributes to higher [disqualification] rates for other non-pilot groups."[40] In 1978, in testimony before Congress, the Federal Air Surgeon conceded that "the precision in medicine is the same regardless of age,"[41] and the FAA's Deputy Administrator affirmed that the FAA held that co-pilots made the air carrier system "fail-safe" for pilot incapacitation.[42] In 1980, the year before the IOM report was issued, FAA conceded in court that it had and applied a protocol for the detection, diagnosis, tracking, and grant of waivers for Part 121 air carrier pilots with cardiovascular disease.[43] In that case, FAA conceded that its liberalized airline pilot exemption policy had begun in 1972, covered six of nine "absolutely disqualifying" medical conditions by 1980; but the required "special testing and evaluation requirements" were only

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39 Better Management Needed of Medical Research on Aging, 38th Report by the Committee on government Operations, 89th Cong., 2d. Sess., September 26, 1966. H.Rep. 2080, Appendix B (FAA statement), p. 19.

40 Booze CF, Characteristics of Medically Disqualified Airmen Applicants During Calendar Year 1971, FAA Office of Aviation Medicine, AM-74-5, May 1974, at 4. *See also*, Petition, notes 217-221 and associated texts. The several authors of these FAA studies were FAA/CAMI employees Booze, S. Dark, and L. Downey.

41 Age Discrimination Against Airline Pilots; Hearing before the Select Committee On Aging, House of Representatives, 96th Cong., 1st Sess. March 21, 1979. Comm. Pub. No. 96-183, at 51.

42 *Id.*, at 53. *See* Petition, footnotes 214, 62, 131, and associated texts.

43 Delta Air Lines v U.S., 490 F. Supp. 907 (N.D. GA 1980). The protocol is reprinted in the opinion as "Appendix A."

"rarely" performed.[44] A subsequent GAO report reveals that by 1989, the FAA had expanded these exemptions to all "absolutely disqualifying" medical conditions for Part 121 air carrier pilots except insulin dependent diabetes—and a 60th birthday.[45]

Following review of the IOM report, three public hearings, and scores of written submissions, the National Institute on Aging Panel similarly found no "medical evidence to support age 60, or any other specific age for mandatory pilot retirement"[46] (underling in the original), recommended the grant of exemptions to air carrier pilots, and provided a protocol therefor.[47] The NIA panel declined to make a conclusive recommendation on the rule due to the lack of operational data on which to base such decision, harshly blaming the FAA directly for this deficiency.[48]

In rejecting the first petition for exemptions following these reports,[49] the 7th Circuit ignored the above, relied heavily on the 28 year-old ALPA v Quesada, spoke much of "increased risk of incapacitation" and "deteriorating skills," but made no correlation of either to air carrier pilots or their risk of accident; made no reference to multi-crews, co-pilot presence, or "fail-safe" Part 121 air carrier systems; and cited to no air carrier accidents or incidents charged to these

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44 *Id.*, at 914.

45 GAO Fact Sheet, Aviation Safety, Information on FAA's Age 60 Rule for Pilots, GAO/RCED-90-45FS, November 1989. At 16.

46 Report of the National Institute on Aging Panel on the Experienced Pilots Study, Department of Health and Human Services, NIH, NIA, Bethesda, Md. 20205, August, 1981. (At 1, 2.)

47 *Id.* at 22-25.

48 *Id.*, at 17.

49 Aman v FAA, 856 F.2d 946 (7th Cir. 1988).

defects from the earliest days of commercial aviation onward. The court identified and cited to two expert witnesses for interested parties (the Air Transport Association and ALPA), and three not included in the exemption docket—Flinn, Billings, and Acker—all supporting the rule. (At 953.) Conversely, for the pilots, it declared: "A detailed recitation of the petitioners' evidence would serve no useful purpose." (At 954.) With respect to the Congressionally mandated IOM and NIA reports, the court made no reference to the IOM findings, and repeated the NIA Panel's recommendation "that the rule be retained as a general policy," accepting, without question, the FAA's refusal to grant the exemptions as recommended. (At 948.)

This is abdication, not deference.

2. Utter Contempt:

Following the IOM and NIA criticisms of its (then) 2-decades old medical/incapacitation arguments, FAA commissioned, in 1982, the Golaszewski Flight Time Study to produce a statistical proof of increasing risk above age 60.[50] Using unvalidated data and an invalid methodology defined only in a footnote, FAA manufactured multiple charts falsely illustrating an increase in risk beginning precisely at age 60. Unfortunately—for the FAA—its own Office of Aviation Safety had rejected and refused to publish the study at delivery "because there are major data deficiencies [and] other problems ... discussed by experts in

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[50] Golaszewski RS, The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates, Acumenics Research and Technology, Inc., Bethesda, Maryland, Order No. DTRS57-83-P-80750, June 30, 1983.

the aviation field and in my office."[51] Despite this summary rejection from within and universal criticism without,[52] FAA has promoted this study and its flawed results to the courts, to the public, to Congress, and to the international aviation community *ever since* as "the best scientific evidence" that risk increases above age 60.[53] Among FAA's targets of misinformation were the 7th Circuit in Baker,[54] and the Government Accounting Office (GAO).[55] Through proxies, this discredited and misleading formulation from this discredited and rejected study was also falsely promoted to Congress' Office of Technology Assessment (OTA) as a NASA Ames product,[56] and to the Australian courts and Human Rights Commission.[57].

Because the agency was aware of the study's flaws and its own misrepresentations, its submission to the 7th Circuit in Baker was probably simple fraud. For the same underlying reasons, an FAA official's representation to the GAO was

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51 Kenneth M. Chin, Executive Officer, Office of the Assistant Administrator for Aviation Safety, FAA, letter to Samuel D. Woolsey ([month illegible] 24, 1991). *See* Petition, note 81 and related text, Exhibit U.

52 *See* Petition, notes 243-246, 248-250, 257 and associated texts for range and credentials of authorities criticizing the study, as well as their descriptions of the flaws.

53 *See, e.g.*, Petition, notes 32, 113, 119, 127, 134 and associated texts. The "fourth report" cited by FAA in the instant case (Denial, page 11) was a replication of its earlier Golaszewski misrepresentations (*See* Petition, notes 143-49 and texts.)

54 Baker v FAA, 917 F.2d 318 (7th Cir. 1990)

55 GAO Fact Sheet, Aviation Safety, Information on FAA's Age 60 Rule for Pilots, GAO/RCED-90-45FS, November 1989, at 17.

56 *See* Petition note 248.

57 *See*, Petition, Notes 244-258 and associated texts.

potentially prosecutable as a felony under 18 U.S.C. § 1001(a)(2), (3), and/or (c)(2). *See* Brogan v US, No. 96-1579 (1998) where even the "exculpatory no" is not excused.

Today, the FAA's best defense of its rule is the long list of judicial affirmations, starting with those of Judge Bicks and the 2nd Circuit in ALPA v Quesada.[58]

3. Unending Litigation:

When the 7th Circuit, in Baker, observed that the pilot/petitioners faced a "Catch-22"—"they cannot get exemptions until they show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions"—it revealed, albeit unwittingly, that it had been flummoxed. As noted above, the FAA has never argued that increasing age, *per se*, increases risk. In its formulations in 1959, before Judge Bicks in ALPA v Quesada, the 7th Circuit in Starr, Aman, and there, Baker, the DC Circuit in Yetman v Garvey, and here, Butler, et al.,[59] the FAA's argument has been that, in the *general population*, certain medical defects, primarily incapacitations, become more likely with increasing age. The FAA has never argued, however, that the air carrier pilot population is similarly afflicted (*see* notes 39, 40 and text, above), that these medical defects are not detectable in older populations (*see* note 41 and text, above), are unmanageable when detected in air carrier pilots (*see* notes 43-45 and text above), or compromise safety in the multiple-crew, fail-safe, Part 121 air carrier operating system if/when they do occur (*see* note 42 and text, above).[60]

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58 *See* FAA's Denial of Exemptions, p. 7.

59 *Ibid.* Review the Denial for a larger, but still incomplete list.

60 *See* Petition, Notes 180-208 and associated texts.

The courts will continue to face an unceasing stream of appeals on this issue unless and until they demand of the FAA a fair and honest appraisal of this core question: Do the FAA's claimed "critical medical defects," if/when they occur in the *unique, super-select Part 121 air carrier pilot population,* compromise safety in the FAA's *fail-safe, Part 121 air carrier system*? Independent of age.

Nothing less will restore to the judiciary—and to this Court—the authority, independence, and respect you must command if you are to fulfill your legitimate oversight obligations in the American administrative State.

CONCLUSION

This Court should remand to the court below with instructions to determine first whether the Administrator is a credible witness in her denial of the requested exemptions. If she is found to be, the court below should then determine whether she had before her properly admissible, credible evidence relevant to safety *in the Part 121 air carrier system* sufficient to justify her denial of the requested exemptions on that basis. If the first question is found in the negative, however, the court should be ordered consider the requests *de novo,* or assign them to a special master, with discovery, for examination and recommendation.

Respectfully submitted:

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